Joremi bin Kimin & Anor v Tan Sai Hong

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J–02–409 OF 1999
SHAIK DAUD, DENIS ONG AND HAIDAR JJCA
21 DECEMBER 2000

Civil Law *— Damages — Dependency claim — Definition of wife — Whether respondent was 'wife' of deceased under s 7(2) of Civil Law Act 1956 — Whether unregistered customary marriage defeats claim for dependency — Whether Law Reform (Marriage and Divorce) Act 1976 relevant*

Words and Phrases *— 'Wife' — Civil Law Act 1956 s 7(2)*

The respondent sued the appellants for damages arising out of a motor accident which resulted in the death of Chong Sey Kow ('the deceased'). The respondent, being the widow of the deceased, sued on behalf of herself and her two children as plaintiff. The trial judge found the first appellant 100% liable. The appellants appealed. The appellants raised an issue of law, ie whether the respondent was the 'wife' of the deceased under the Law Reform (Marriage and Divorce) Act 1976 ('the Act') and as such whether she had the legal capacity to bring the action claiming for damages for herself as a dependant of the deceased. It was not disputed that the marriage which was contracted in 1986 between the parties was a customary marriage and was not registered under s 22(4) of the Act.

Held, dismissing the appeal:

(1) The word 'wife' found in s 7(2) of the Civil Law Act 1956 should not be restricted to a woman whose marriage has been solemnized and registered pursuant to the provisions of any prevailing Act relating to marriage and divorce. The Married Women Act 1957 provides that a 'married woman' includes any woman who has undergone a customary marriage — such a 'married woman' would fall within the contemplation of the word 'wife' as found in s 7(2) of the Civil Law Act 1956 — and the Act also provides that she shall be capable of suing in tort and shall be entitled to all remedies and redress for all purposes. The respondent, having undergone a customary marriage with the deceased, was a 'wife' and hence had locus standi to bring this action on behalf of the deceased's estate (see p 273B–C).

(2) An appellate court should be slow in disturbing the finding of facts of the trial court unless it can be shown that certain finding is against the weight of the evidence or is not supported by evidence (see p 273F). On the issue of credibility of the first appellant where the learned judge treated his evidence with caution for the reason that it is full of contradictions, inconsistencies and discrepancies, the appellate court is in no position to disagree as the learned judge would be the best person

to observe the demeanour and credibility of the first appellant (see p 274E).

[**Bahasa Malaysia summary**

Responden telah mendakwa perayu-perayu untuk ganti rugi yang timbul daripada kemalangan jalan raya yang mengakibatkan kematian Chong Sey Kow ('si mati'). Responden, yang merupakan balu si mati telah mendakwa bagi pihak dirinya dan juga kedua-dua anaknya sebagai plaintif. Hakim perbicaraan telah mendapati perayu pertama 100% bertanggungan. Perayu telah merayu. Perayu-perayu telah membangkitkan suatu isu undang-undang, iaitu sama ada responden adalah isteri 'si mati' di bawah Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut') dan dengan demikian sama ada beliau mempunyai kapisiti undang-undang untuk membawa tindakan untuk menuntut ganti rugi untuk dirinya sebagai tanggungan si mati. Adalah tidak dipertikaikan bahawa perkahwinan tersebut yang dikontrak dalam tahun 1986 antara pihak-pihak adalah perkahwinan adat dan tidak didaftarkan di bawah s 22(4) Akta tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Perkataan 'isteri' yang terdapat di dalam s 7(2) Akta Undang-Undang Sivil 1956 tidak sepatutnya dihadkan kepada seorang wanita di mana perkahwinannya diupacarakan dan didaftarkan menurut mana-mana peruntukan Akta yang berkuatkuasa berkenaan dengan perkahwinan dan perceraian. Akta Perempuan Bersuami 1957 memperuntukkan bahawa seorang 'wanita bersuami' termasuk wanita yang melaksanakan perkahwinan secara adat — 'wanita bersuami' sedemikian akan jatuh di bawah maksud perkataan 'isteri' seperti di dalam s 7(2) Akta Undang-Undang Sivil 1956 — dan Akta juga memperuntukkan bahawa beliau boleh mendakwa di dalam tort dan berhak kepada semua remedi dan tebus rugi bagi segala tujuan. Responden, yang telah melalui perkahwinan adat dengan si mati, adalah 'isteri' dan dengan itu mempunyai locus standi untuk membawa tindakan ini bagi pihak estet si mati (lihat ms 273B–C).

(2) Suatu mahkamah rayuan akan was-was sebelum menganggu penemuan fakta-fakta mahkamah perbicaraan kecuali jika boleh ditunjukkan bahawa penemuan tertentu tersebut adalah bercanggah dengan beban keterangan atau tidak disokong oleh keterangan (lihat ms 273F). Atas isu kebolehpercayaan perayu pertama di mana hakim yang arif tidak mempercayai keterangannya kerana dikatakan terdapat penyangkalan, keterangan yang tidak konsisten dan kesilapan-kesilapan, mahkamah rayuan tidak berhak tidak mempercayai hakim perbicaraan tersebut kerana hakim yang arif adalah orang yang

terbaik untuk melihat perilaku dan kebolehpercayaan perayu pertama (lihat ms 274E).]

Cases referred to

Chan Chin Ming & Anor v Lim Yok Eng [1994] 3 MLJ 233 (refd)
Chong Sin Sen v Janaki a/p Chellamuthu (suing as widow of Muniappa Pillai a/l Maritha Muthoo, deceased, on behalf of herself and the dependants of the deceased) [1997] 5 MLJ 411 (refd)
T v O [1994] 4 CLJ 593 (refd)

Legislation referred to

Civil Law Act 1956 s 7(2)
Law Reform (Marriage and Divorce) Act 1976 ss 22(4), 23, 24, 26, 27, 34, Part III
Married Women Act 1957 (revised 1990 Act 150)

Tan Jin Wah (*Tan & Tan*) for the appellants.
J Chandika (*John Ang & Jega*) for the respondent.

Haidar JCA. (delivering judgment of the court): This appeal is against the award of damages against the appellants as defendants by the High Court at Johor Bahru, arising out of a motor accident on 7 December 1992 at about 10am at $14^{1}/_{2}$ milestone along the stretch of Jalan Utama/Jalan Kota Tinggi/ Johor Bahru road. It resulted in the death of Chong Sey Kow (deceased). Tai Sai Hong (widow), the respondent, sued on behalf of herself and her two children as plaintiff.

Quite apart from the issue of liability, the appellants raised an issue of law, that is, whether Tai Sai Hong was the 'wife' of the deceased under the Law Reform (Marriage and Divorce) Act 19764 ('the Act') and as such, had she the legal capacity to bring the action claiming for damages for herself as a dependant of the deceased. This issue was premised on the fact that the marriage between the parties was a customary marriage contracted in Singapore and it was neither registered in Singapore nor under s 22(4) of the Act . This fact was admitted to by Tai Sai Hong, the respondent. Why the marriage was not registered in Malaysia was not clear.

Status of the respondent as the 'wife' of the deceased

When the parties contracted the customary marriage in Singapore at the deceased brother's house, as well as in Kota Tinggi, Johor in 1986, the Act was already in force with effect from 1 March 1982 and the Act obviously would be applicable to them. However, the Act does not provide the definition of 'wife'. At most, by implication, wife must be a woman who undergoes a marriage in accordance with Part III of the Act, and such marriage may be solemnized:

(a) in the office of a registrar or elsewhere (s 23);

(b) through religious ceremony, custom or usage (s 24);

(c) in Malaysian embassies etc, abroad (s 26).

Section 27 of the Act requires the registration of the marriage pursuant to the Act.

In this case, as the respondent underwent a customary marriage not in accordance with s 24 of the Act, counsel for the appellants submitted that by virtue of s 22(4) of the Act, the purported customary marriage was not valid and cited *T v O* [1994] 4 CLJ 593 in support thereof.

In *T v O*, the learned judge there was concerned with the issues of the legitimacy of the child of the customary marriage, and whether such marriage was void or voidable due to non-registration. It was unfortunate that s 34 of the Act was not considered by the learned judge, or maybe it was not brought to his attention. Section 34 reads:

> Nothing in this Act or the rules made thereunder shall be construed to render valid or unvalid any marriage which otherwise is invalid or valid merely by reason of its having been or not having been registered.

If the learned judge in *T v O* had the benefit of considering s 34, the result might well be different.

In this appeal before us, the learned judge relied on s 34 in order to overcome the difficulty of the invalidity of the customary marriage on ground of non-compliance with the provisions of the Act, including non-registration of the customary marriage of the parties. He held that by virtue of s 34, the customary marriage between the respondent and the deceased was valid and it should not be declared invalid because it was not registered. This was on the premise that registration is merely a formality and the true essence and substance of the Act as stated in the preamble is to provide for monogamous marriages and there is nothing to show that the marriage between the respondent and the deceased was not a monogamous one.

Be that as it may, what we are concerned with here really is not the validity or otherwise of the customary marriage between the parties, but rather whether the respondent was the 'wife' of the deceased within the meaning and contemplation of the word 'wife' in s 7(2) of the Civil Law Act 1956.

There has been judicial interpretation of s 7(2), but it is only confined to the class of persons who are entitled to claim loss of support in respect of a deceased person, (see *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233) However, it was brought to our attention by the counsel for the respondent of another High Court decision that considered, as in this appeal, the issue of whether a wife who underwent a customary marriage and it was not registered under the Act, is a 'wife' for the purposes of a claim pursuant to s 7(2) of the Civil Law Act 1965. It was the decision of Mohd Ghazali J in *Chong Sin Sen v Janaki a/p Chellamuthu (suing as widow of Muniappa Pillai a/l Maritha Muthoo, deceased, on behalf of herself and the dependants of the deceased)* [1997] 5 MLJ 411.

The facts of the present appeal are more or less the same as the facts in *Chong Sin Sen's* case. In his well reasoned judgment, this is what Mohd Ghazali J, said regarding 'wife' at p 417:

> As quite rightly submitted by counsel for the respondent, the word 'wife' is not defined in the CLA. Counsel for the appellant has argued that after the date of coming into operation of the 1976 Act, a marriage contracted in contravention of the provisions of the act shall be void. Section 9 which is found under Pt III of the 1976 Act provides a marriage under the act may be solemnized only by the registrar and s 22(4) provides every marriage purported to be solemnized in Malaysia shall be void unless a certificate for marriage or a licence has been issued by the Registrar or Chief Minister or a statutory declaration under sub-s (3) has been delivered to the Registrar or Assistant Registrar as the case may be. Section 5(4) provides that after the date of coming into operation of the act, no marriage under any law, religion, custom or usage may be solemnized except as provided in Pt III. On the face of it, it would seem that the customary marriage underwent by the respondent and the deceased, as far as the 1976 Act is concerned, would be void — they had only contracted a customary marriage after the date of coming into operation of the 1976 Act and there is no evidence to show that it was solemnized pursuant to the provisions of the 1976 Act, neither has the respondent furnished a copy of the certificate of marriage issued pursuant to the act , Since the respondent's marriage to the deceased would seem to be void pursuant to the provisions of the 1976 Act, does that preclude her from bringing an action under ss 7 and 8 of the CLA? In other words, is the respondent a 'wife' within the contemplation of s 7(2) of the CLA?
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> In my opinion, since the legislature has seen it fit not to define what is meant by a 'wife' in the CLA, and unless there be something in the context to the contrary, I would think that that word should be read as applicable to those things to which they would in their natural sense apply. I cannot find anything in the CLA which provides that the term 'wife' as found in s 7(2) should be confined to a woman who is a party to a marriage solemnized and/or registered under any prevailing Act relating to marriages and divorce. That being the case, I would think that it is for the court to interpret that word as found in the CLA as best it may.

The learned judge in *Chong Sin Sen* then went on to consider the Married Women Act 1957 (revised in 1990 as Act 150) vis-a-vis the Act regarding the meaning to be attributed to the word 'wife' in s 7(2) of the Civil Law Act 1965 at p 420:

> In the instant case, I would decline to consider the provisions of the 1976 Act which to me is a statute which proceeds on different lines and includes different provisions which deals with a different subject matter. The preamble to the 1976 Act reads:
>
> > 'An act to provide for monogamous marriages and the solemnization and registration of such marriages; to amend and consolidate the law relating to divorce; and to provide for matters incidental thereto.'
>
> I am unable to see how it ought to have any influence upon the question which I have to decide, ie whether the respondent falls within the contemplation of the word 'wife' found in s 7(2) of the CLA. I do not think that I should speculate on what the intention of the legislature was with regard to s 7(2), ie as to whether such a term should only be restricted to a 'married woman' who

A has undergone a marriage solemnized and registered in accordance with the prevailing Act relating to marriages.

What the legislature intended to be or not to be done can only be ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication. In my opinion, I do not think that the word 'wife' found in s 7(2) of the CLA should be restricted to a woman whose B marriage has been solemnized and registered pursuant to the provisions of any prevailing Act relating to marriage and divorce. The Married Women Act 1957 provides that a 'married woman' includes any woman who has undergone a customary marriage — to me, such a 'married woman' would fall within the contemplation of the word 'wife' as found in s 7(2) of the CLA — and the act also provides that she shall be capable of suing in tort and shall be C entitled to all remedies and redress for all purposes. In the instant case it is my view that the respondent, having undergone a customary marriage with the deceased, is a 'wife' and hence had locus standi to bring this action on behalf of the deceased's estate and that being so, I dismissed the appeal with costs.

For the record, we have examined all the laws that were repealed by the Act and there is no definition of 'wife' under any of these repealed laws (see the D schedule to the Act — s 109).

We respectfully agree and adopt the reasoning and conclusion of Mohd Ghazali J. As in this appeal, we are similarly of the opinion that the respondent was the wife of the deceased within the contemplation of s 7(2) of the Civil Law Act 1965. The learned judge in this case did not err in his E conclusion that the respondent was entitled to claim for loss of dependancy for herself and on behalf of her three children.

Liability

The learned judge found the first appellant 100% liable for the accident. F Counsel for the appellants contended that liability should be on 50%–50% basis on the evidence before the court.

It is trite that an appellate court should be slow in disturbing the finding of facts of the trial court unless it can be shown that certain findings are against the weight of the evidence or are not supported by evidence.

G On this issue of liability, we need only consider three grounds put forth by the appellants, if at all there are merits. They are:

(a) 'G' in the sketch plan was not brake marks made by the lorry;

(b) the first appellant did not encroach into the path of the deceased motorcyclist;

H (c) glass splinters from the headlamp of the motorcycle marked 'H' in the sketch plan were found on the first appellant's lane of the road, ie 2.2ft from the centre of the road.

In respect of (a), we have examined the record and the learned judge was right in his finding that 'G' in the sketch plan were brake marks made by the I lorry. This finding is clearly based on the testimony of the investigating officer (SP3) as well as in the sketch plan and the key. This is what SP3 said:

'G' di muka surat II adalah kesan brake. Ya, ianya tunjuk keseluruhan kesan brake itu.

'G' merupakan kesan brake tayar lori tetapi saya tidak pasti sebelah mana tayar lori itu.

With respect to counsel for the appellants, this piece of evidence was not even challenged in the court below. It is too late in the day for counsel to raise this issue. It is a non-issue.

In regard to (b), we are of the view that the learned judge in his judgment had adequately considered the evidence of the first appellant (SD1), and the sketch plan and key, in particular the brake 'G' when he came to a finding that the first appellant had cut corners whilst negotiating a right hand bend and held that the first appellant was definitely encroaching into the path of the motorcyclist. We see no reasons to disagree with him.

In respect of (c), according to the evidence of the investigating officer (SP3), the broken glass fragments marked 'H' were mostly found in the centre of the road. The learned judge, however, held that 'H was not the point of collision as after the accident he found that the lorry had dragged the deceased's motorcycle forward and the glass pieces were scattered and strewn at the point. He was, in our view, entitled to come to that conclusion on the evidence before him.

Finally, on the issue of credibility of the first appellant where the learned judge treated his evidence with caution for the reason that it was full of contradictions, inconsistencies and discrepancies, we are in no position to disagree with him as he would be the best person to observe the demeanour and credibility of the first appellant.

To sum up, we would say that on the issue of liability, it is essentially a question of facts and there are no compelling grounds for us to interfere.

On the issue of the award of the dependency claim of RM1,250 to the respondent and her three children, it only constitutes about 53% of the deceased's earnings of S$1,428 which is equivalent to RM2,345. We are of the view that it is a fair and reasonable amount.

For the reasons stated, we dismissed the appeal with costs and affirmed the order of the learned judge. The deposit is to go to the respondent towards her taxed costs.

Appeal dismissed.

Reported by Benjamin Yong